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Nos. 95-345 and 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. In No. 95-345, the question presented is whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for manufacturing marijuana because the government obtained a consent judgment in a civil action that sought the forfeiture of respondent's property on the ground that it had been used to facilitate drug activities.

2. In No. 95-346, the question presented is whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities where the owners of the property were prosecuted for, and convicted of, narcotics and money laundering crimes.

PARTIES TO THE PROCEEDINGS

The petitioner in both cases is the United States of America. The respondent in No. 95-345 is Guy Jerome Ursery. The respondents in No. 95-346 are Charles Wesley Arlt, James Wren, Payback Mines, and the property listed in the caption to the final judgment of forfeiture, 95-346 Pet. App. 75a-77a.

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OPINIONS BELOW

The opinion of the court of appeals in No. 95-345 (95-345 Pet. App. 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (95-345 Pet. App. 38a-41a) is not reported. The opinion of the court of ap-

peals in No. 95-346 (95-346 Pet. App. 1a-23a) is reported at 33 F.3d 1210. An order amending that opinion (95-346 Pet. App. 24a-25a) is reported at 56 F.3d 41.

JURISDICTION

The judgment of the court of appeals in No. 95-345 was entered on July 13, 1995. The judgment of the court of appeals in No. 95-346 was entered on September 6, 1994. A petition for rehearing was denied in No. 95-346, and the opinion was amended, on May 30, 1995. 95-346 Pet. App. 24a-29a. Petitions for writs of certiorari were filed in both cases on August 28, 1995, and were granted by the Court on January 12, 1996 (J.A. 81a-82a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 18 U.S.C. 371, 981, and 1956 and 21 U.S.C. 841, 846, and 881 are reproduced in the appendices to the petitions for certiorari.

STATEMENT

1. *No. 95-345.* After a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 63 months' imprisonment, to be followed by four years' supervised release. The court of appeals reversed his conviction. Pet. App. 1a-27a.

a. On July 30, 1992, Michigan State Police executed a search warrant and found 142 marijuana plants growing on land just outside the boundaries of respondent's property in Perry, Michigan. Pet. App. 2a. Inside respondent's house, the officers found marijuana seeds, stems, and stalks, two loaded firearms, and a growlight. *Ibid.* While investigating that crime, law enforcement officers learned that respondent had been growing marijuana on his property and the land adjoining it for at least three years. During that period, respondent, his wife, and his son would harvest the marijuana, bring it back to respondent's house, and hang it in a crawlspace to dry. J.A. 44-56, 65-66.

b. On September 30, 1992, the government filed an *in rem* complaint seeking forfeiture of respondent's property under 21 U.S.C. 881(a)(7). Pet. App. 28a-31a. The complaint alleged that, "[f]or several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance." *Id.* at 29a. Respondent and his wife filed a claim to the property and an answer to the forfeiture complaint. Subsequently, on May 24, 1993, respondent and his wife settled the forfeiture action by agreeing to pay $13,250 in lieu of the forfeiture of the property. *Id.* at 32a-37a.

c. In the meantime, on February 5, 1993, a grand jury returned an indictment charging respondent with a single count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a. The indictment charged that the manufacturing offense occurred on July 30, 1992, the date on which Michigan State Police searched respondent's property. Respondent was not indicted for narcotics possession

or distribution offenses, nor was he charged with any other criminal offense on the basis of his unlawful activities in the years leading up to the search. After his conviction on the manufacturing charge, respondent moved to dismiss the indictment on the ground that the Double Jeopardy Clause barred his criminal conviction following the civil forfeiture of his property. The district court denied the motion, finding that the forfeiture proceeding was not an "adjudication" because it was settled by a consent judgment and that "the forfeiture proceeding and criminal conviction were 'part of a single, coordinated prosecution of [a] person involved in alleged criminal activity.'" *Id.* at 39a (quoting *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994)).

d. A divided panel of the Sixth Circuit reversed. Pet. App. 1a-27a. The majority first found that "jeopardy" had attached in the civil forfeiture proceeding because the "consent judgment in [the] civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case." *Id.* at 6a. The court concluded that, because jeopardy attaches in a criminal case when the trial court accepts the defendant's plea, "[j]eopardy attached in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture." *Id.* at 7a.

Relying on *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the court next concluded that "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." Pet. App. 11a. The court then rejected the government's argument that respondent's criminal conviction and the civil forfeiture of his property did not constitute punishment for the "same offence" within the meaning of the Double Jeopardy Clause. The court explained that "the forfeiture necessarily requires proof of the criminal offense. * * * The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." *Id.* at 12a. Finally, the court acknowledged that the government may impose multiple punishments for the same offense in a single proceeding, but it declined to find that the parallel civil forfeiture and criminal actions constituted a "single, coordinated proceeding" for double jeopardy purposes, because the actions proceeded before different judges and because there was no communication between the government lawyers assigned to the civil and criminal efforts. *Id.* at 13a-17a.

Judge Milburn dissented. Pet. App. 19a-27a. In his view, the question whether parallel criminal and civil actions are a "single proceeding" for double jeopardy purposes should turn on "the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings." *Id.* at 22a. That approach, he argued, "avoids the inevitable difficulty of a case-by-case comparison of the level of coordination" between the civil and criminal actions. *Ibid.* Because the "government was not acting to pursue a second punishment out of dissatisfaction with the first outcome" and the civil and criminal actions were active during the same time frame, he concluded that those actions were a single double jeopardy proceeding. *Id.* at 22a, 25a.[1]

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[1] Judge Milburn also rejected the majority's conclusion that the civil and criminal actions imposed punishment for the "same offence." He noted that the civil forfeiture complaint

2. *No. 95-346.* In this civil forfeiture action, the district court granted summary judgment to the United States and ordered the forfeiture of United States currency, a helicopter, a boat, an airplane, 138 silver bars, and 11 automobiles. The court of appeals reversed. Pet. App. 1a-23a.

a. Respondents Wren and Arlt participated in a massive conspiracy to manufacture methamphetamine. Respondents and others purchased large quantities of precursor chemicals and delivered them to methamphetamine manufacturers. Respondent Wren not only ordered large quantities of the chemicals, but, with another conspirator, also "transported hundreds of thousands of dollars in cash to pay for" them. Respondent Arlt aided and abetted the manufacture of methamphetamine, and hired others to transport the drugs and to act as intermediaries with Mexican traffickers. See *United States* v. *Arlt*, No. 92-50467, 1994 WL 678535 (9th Cir. Dec. 1, 1994).

On June 12, 1991, a grand jury returned a superseding indictment charging Arlt, Wren, and five others with conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. 846. The indictment also charged Arlt and Wren with conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371, and Arlt was charged with 17 counts, and Wren with 13 counts, of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 79a-105a. On March 27, 1992, after a jury trial, Arlt and Wren were convicted on all counts. The district court sentenced Arlt to life imprison-

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charged that the defendant property had been used to grow marijuana "for several years," but that the indictment charged an offense occurring on a single day. Pet. App. 26a-27a.

ment and a ten-year term of supervised release, and imposed a fine of $250,000. *Id.* at 106a-108a. Wren was sentenced to life imprisonment and a five-year term of supervised release. *Id.* at 109a-111a.[2]

b. On June 17, 1991, five days after the return of the superseding indictment, the government filed an *in rem* complaint seeking forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981(a)(1)(A) of currency, cars, vessels, silver bars, and aircraft seized from or titled to Arlt, Wren, or Payback Mines, a corporation controlled by Arlt. Pet. App. 30a-49a. Wren, Arlt, and Payback Mines filed claims to the defendant properties. By agreement of the parties, litigation of the forfeiture action was deferred during the pendency of the criminal prosecution. *Id.* at 50a-52a.

After respondents' criminal convictions, the government sought summary judgment in the forfeiture case, contending that the defendant assets were the proceeds of illegal narcotics trafficking and, alternatively, were "involved in," or "traceable to" properties involved in, money laundering. The district court granted the government's motion. The court found that all of the assets were subject to forfeiture as proceeds of illegal narcotics activity. In

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[2] On December 1, 1994, the Ninth Circuit reversed Arlt's conviction on the ground that he was improperly denied his right to self-representation, and remanded for a new trial. See *United States* v. *Arlt*, 41 F.3d 516. That decision did not affect Wren's conviction, the only other claimant who was criminally prosecuted. Wren's conviction was affirmed by the same panel in an unpublished order, but (on the government's cross-appeal) the panel vacated his sentence and remanded for resentencing. See *United States* v. *Wren*, No. 92-50467, 1994 WL 678535 (Dec. 1, 1994).

the alternative, the court held that, except for the silver bars, the defendant property was subject to forfeiture under the money laundering theory. Pet. App. 53a-74a.

c. The Ninth Circuit reversed the forfeiture judgment. Pet. App. 1a-23a. The court held that the forfeiture of Wren's and Arlt's property constituted punishment for the same offenses that had formed the basis for their criminal convictions and thus that the forfeiture judgment imposed an impermissible second punishment, in violation of the Double Jeopardy Clause. First, the court held that the civil forfeiture and criminal prosecutions constituted "separate proceedings" for double jeopardy purposes. *Id.* at 7a. Although the court acknowledged that two other circuits had come to the opposite conclusion, *id.* at 8a (citing *United States* v. *Millan*, 2 F.3d at 20; *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994)), it found that "[a] forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." Pet. App. 8a.

The court further found that civil forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981 invariably constitutes punishment. The court recognized that, under *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), it was "clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes." Pet. App. 13a. The panel concluded, however, that this Court "changed its collective mind" (*ibid.*) in *United States* v. *Halper*, 490 U.S. 435 (1989), by holding that certain civil proceedings can result in punishment for purposes of

the Double Jeopardy Clause's prohibition on multiple punishments. The panel found confirmation for that conclusion in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which held that civil forfeitures of property used to facilitate a drug crime should be considered "punishment" for purposes of determining the threshold applicability of the Excessive Fines Clause of the Eighth Amendment. The panel found that "the only fair reading" of *Austin* is that all civil forfeitures must be deemed "punishment" not only under the Eighth Amendment, but also under the Double Jeopardy Clause. Pet. App. 15a.

d. The government sought rehearing and suggested rehearing en banc, which the court of appeals denied. In denying rehearing, the panel amended its opinion to note (Pet. App. 25a) that its categorical approach was also "compelled" by *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), a case decided before the panel's decision, but not cited in its original opinion. The panel explained that *Kurth Ranch* "applied *Austin*'s categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a statute that taxed drug monies." Pet. App. 25a.

Seven judges dissented from the denial of rehearing en banc. Pet. App. 25a-29a. Writing for the dissenters, Judge Rymer disputed the panel's conclusion that forfeiting the proceeds of unlawful activity is "punishment." *Id.* at 27a. She also noted that the panel's categorical approach to punishment questions "writes *89 Firearms* off the books" by citing *Halper* and *Austin* "out of context and surmising that 'the Court changed its collective mind' * * * despite the fact that

the Court itself didn't say that it had." *Ibid.* Judge Rymer also rejected the panel's view that *Kurth Ranch* should be read to support a "categorical" approach to the forfeiture of proceeds, noting that "*Kurth Ranch* was a double jeopardy case • • • that was decided after *Austin*, yet mentioned *Austin* only in passing and then only as holding that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines." *Id.* at 29a n.3 (citing *Kurth Ranch*, 114 S. Ct. at 1945).

SUMMARY OF ARGUMENT

The courts below concluded that under *United States* v. *Halper*, 490 U.S. 435 (1989), and this Court's decisions since *Halper*, each respondent was twice punished, in violation of the Double Jeopardy Clause of the Fifth Amendment. Each court, viewing the second "punishment" as having resulted from an impermissible second "proceeding" against respondents, ordered the second "proceeding" (the forfeiture in *$405,089.23* and the criminal conviction in *Ursery*) dismissed in its entirety. That analysis is erroneous for several independent reasons.

A. The core protection of the Double Jeopardy Clause is the prohibition against prosecuting a defendant more than once for the same offense. That protection is triggered only when a defendant is placed "in jeopardy." This Court's cases have defined that phrase to denote the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. That understanding of "jeopardy" flows from the unique role and consequences of criminal sanctions in our society.

It also accords with the Clause's historical origins in common-law pleas peculiar to the criminal process.

In rare cases, that core protection against successive prosecutions may be relevant when the government invokes a purportedly civil statute that is so pervasively punitive that due process requires that its sanctions be enforced only after a criminal trial. *E.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In such a rare case, the application of the purportedly civil sanction could be said to place the defendant "in jeopardy." But that limited principle does not help respondents in these cases, because this Court has long held that *in rem* forfeitures pursuant to civil statutes are not so punitive that they may be enforced only with the safeguards of a criminal trial. The Court most recently reaffirmed that view in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), in which it unanimously rejected the double jeopardy claim of a property owner who had been tried for and acquitted of the criminal offenses underlying the forfeiture. In light of *89 Firearms*, respondents have no double jeopardy claim that they have been subjected to multiple *prosecutions*.

B. The courts below relied principally on the multiple *punishments* strand of double jeopardy law, which they believed was effectively revolutionized by this Court's decision in *Halper*. That conclusion reflects a grave misunderstanding of the scope of the prohibition of multiple punishments as applied in *Halper*. That doctrine, which originated with *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), protects two distinct interests of a criminal defendant. The first is that a court may not impose a greater sentence than the legislature authorized. The second is that a court may not increase a defendant's sen-

tence if to do so would disturb his legitimate expectation of finality in a criminal judgment. In either event, the protection against multiple punishments is a consequence of the defendant's having been placed "in jeopardy," and then convicted of a crime.

Halper involved the second aspect of the "multiple punishments" doctrine—the protection of a defendant's legitimate expectation of finality in a criminal judgment. In that case, the government sought what the Court viewed as a punitive civil fine after the defendant's criminal sentence had become final. In rejecting that attempt, the Court did not rely on any view that the civil action was an impermissible second *prosecution* for the offense. Nor did it reject its precedents dealing with whether a nominally "civil" remedy in fact constituted a "criminal" sanction. The Court concluded only that a defendant's legitimate expectation of finality in his sentence, can, in a "rare case," be upset when the government seeks to inflict additional punishment in a civil proceeding. In such a case, the "multiple punishments" doctrine does not bar the second (civil) proceeding, but only so much of the penalty sought as would constitute an additional sentence.

Halper and the "multiple punishments" doctrine it invoked therefore are relevant only when the government can fairly be said to be seeking, in a proceeding commenced after a criminal judgment has become final and unappealable, to increase the sentence reflected in that judgment. Because respondent Ursery entered into a consent judgment of civil forfeiture before he was placed "in jeopardy," that doctrine cannot help him.

C. The respondents in *$405,089.23* were placed "in jeopardy," and convicted in a criminal case, before entry of the civil judgment forfeiting the proceeds of their crimes. They cannot demonstrate, however, that the civil judgment forfeiting the proceeds of their narcotics trafficking should be viewed as a "punishment" under this Court's double jeopardy cases. Nor would respondent Ursery be able to demonstrate that the forfeiture of his property used to facilitate drug offenses constitutes "punishment."

In concluding that civil forfeitures always impose "punishment," both courts below relied principally on *Austin* v. *United States*, 113 S. Ct. 2801 (1993). *Austin*, however, held only that the forfeiture of property used to facilitate drug offenses is sufficiently punitive to be subject to analysis under the Eighth Amendment's prohibition against excessive fines. *Austin* relied on language in *Halper* for a broad definition of "punishment"—a definition that could include any sanction that serves partly as a deterrent. *Austin* also relied on the Court's view that, as a historical matter, forfeiture of property used to commit crimes has always been considered punitive, at least "i[illegible] part." *Austin*'s analysis is inapplicable here. The civil *in rem* forfeiture of instrumentalities of crime has been a fixture of our law since the Nation's earliest years. Even if understood as partly punitive, those civil laws have never been thought so intrinsically punitive, as a categorical matter, as to trigger double jeopardy scrutiny. The holding of *Halper* requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection. A categorical application of that protection based on the *potential* that a forfeiture statute may produce a punitive judgment is inconsistent with *Halper*'s holding.

Forfeitures of facilitating property should therefore be examined in accordance with the case-by-case approach adopted in *Halper*. Under that approach, a forfeiture of property that facilitated a drug offense should be found remedial if it can rationally be explained as serving the traditional remedial justifications for that *in rem* remedy: encouraging owners to take care in the use of their property; abating a nuisance; and providing recompense to the government for the law enforcement costs and social harms of drug trafficking. That is the case here with respect to respondent Ursery's property.

Even if the forfeiture of "facilitating" property were found generally to impose punishment for double jeopardy purposes, the forfeiture of "proceeds" of narcotics trafficking should not be found punitive. Statutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other *in rem* forfeitures, on which *Austin* relied, but were first adopted within the last 20 years to ensure that criminal activity is not profitable. Those statutes therefore simply prevent unjust enrichment, a plainly remedial, rather than punitive, goal.

D. Even if civil forfeiture amounts to an "offense" that triggers double jeopardy protections, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of those of which respondents were convicted. A straightforward application of the "statutory elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), compels that conclusion. Each of the forfeiture statutes requires proof of a fact that the criminal statutes do not require, to wit, that the defendant property played some role in the commission of a crime. Conversely, each of the criminal statutes requires proof of at

least one element not found in the forfeiture statutes, to wit, the property owner's knowing commission of a crime. Indeed, because the government may obtain forfeiture under 21 U.S.C. 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

E. Finally, even if the forfeitures in these cases constitute "punishment" for the offenses of which the claimants were convicted, the civil and criminal sanctions should be regarded as part of a single proceeding for purposes of the Double Jeopardy Clause. The issue whether a "proceeding" is impermissibly successive for constitutional purposes does not turn on formalities such as whether it bears a new docket number, is heard by a new judge, or is handled by a new government lawyer. Those factors are present in many government sentencing appeals; yet, they do not make the appeal a new "proceeding" at which punishment is improperly increased. Rather, because the "multiple punishments" doctrine protects a legitimate expectation of finality in a criminal sentence, a proceeding is impermissibly successive only when it is commenced after the defendant acquires a legitimate expectation that further punishment will not be imposed. It is then that *Halper*'s underlying concern—to prevent the government from seeking a new punishment because it is dissatisfied with the defendant's sentence—comes into play. That concern is inapplicable in these cases, because the government's conduct reveals a design to seek the authorized civil and criminal sanctions in parallel and contemporaneous proceedings.

ARGUMENT

THE PARALLEL CRIMINAL CONVICTIONS AND CIVIL *IN REM* FORFEITURES IN THESE CASES DID NOT VIOLATE RESPONDENTS' RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

A. *In Rem* Forfeiture Is A Civil, Remedial Sanction That Does Not Implicate The Double Jeopardy Clause's Prohibition Of Multiple Prosecutions

1. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." That Clause "had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon," which "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *United States* v. *Scott*, 437 U.S. 82, 87 (1978); see also *United States* v. *Wilson*, 420 U.S. 332, 340-342 (1975); accord *Grady* v. *Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting), overruled by *United States* v. *Dixon*, 113 S. Ct. 2849 (1993); *Green* v. *United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting). The "core * * * area protected" by the Clause (*United States* v. *Scott*, 437 U.S. at 96) accordingly has always been the defendant's right not to be tried for a criminal charge more than once. *United States* v. *Wilson*, 420 U.S. at 343; see *Schiro* v. *Farley*, 114 S. Ct. 783, 789 (1994) ("[O]ur cases establish that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle' ") (internal brackets and citations omitted); see also *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982); *United States* v. *Dixon*, 113 S. Ct. at

2882 (Souter, J., concurring in the judgment in part and dissenting in part).

As the language of the Clause requires, its protection depends upon the defendant being placed "in jeopardy." See, *e.g.*, *Serfass* v. *United States*, 420 U.S. 377, 388, 390-391 (1975). This Court has interpreted that requirement, in light of its history, as being met only by the dangers associated with the actual trial of a criminal case: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* v. *Jones*, 421 U.S. 519, 528 (1975); see *Serfass* v. *United States*, 420 U.S. at 391 ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused' ") (quoting *Kepner* v. *United States*, 195 U.S. 100, 133 (1904)); *Crist* v. *Bretz*, 437 U.S. 28, 34-36 (1978) ("jeopardy" concept protects accused from repeated attempts "to convict," safeguards his right to have his trial completed by a particular tribunal, and therefore has "roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice"); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943) (" 'jeopardy' within the constitutional meaning" refers to the risks associated with "actions intended to authorize criminal punishment to vindicate public justice").

The reasons for that focus are rooted in the unique role and consequences of criminal sanctions in our society. A conviction represents the societal judgment that a person is a "criminal" and subjects that person to stigma that is unmatched by any other asser-

tion of governmental power. See *Breed* v. *Jones*, 421 U.S. at 530; see also *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970). Each such judgment typically has long-lasting collateral consequences both in the jurisdiction in which the conviction is obtained and in others. See *Benton* v. *Maryland*, 395 U.S. 784, 790 (1969); *Missouri* v. *Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting). Because a criminal prosecution "is an ordeal not to be viewed lightly," *Price* v. *Georgia*, 398 U.S. at 331, the fundamental notion of the Double Jeopardy Clause is that the government

> should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. at 187-188; *Serfass* v. *United States*, 420 U.S. at 388; see also *Tibbs* v. *Florida*, 457 U.S. at 41 ("Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance"). Thus, as a general matter, "[s]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in the enforcement of criminal laws." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.)); see *Abney* v. *United States*, 431 U.S. 651, 661 (1977).

2. Most cases arising under the "multiple prosecutions" doctrine do not require the characterization of the nature of the proceedings, because there is rarely any doubt that the government seeks a second criminal trial. Instead, those cases primarily involve the question whether the second trial falls within an exception to the multiple prosecutions prohibition. See, *e.g.*, *Richardson* v. *United States*, 468 U.S. 317, 323-326 (1984) (permissible to retry defendant when first trial ends with a hung jury); *United States* v. *Scott*, 437 U.S. at 98-101 (permissible to retry defendant when first trial was erroneously terminated at his behest on grounds unrelated to factual guilt); *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896) (retrial permitted after conviction is reversed on appeal).

Nonetheless, the Court has recognized that a civil statute may be so stigmatizing and punitive in all of its applications that it effectively operates as a criminal sanction. In that setting, the nominally civil sanction is properly characterized as criminal in effect, and such a statute cannot be invoked at all without complying with the safeguards that the Constitution requires for criminal trials. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 184-186 (1963) (invalidating a statute that prescribed, without a criminal trial, loss of citizenship for any person who, to evade military service, remained outside the United States in time of war); *Wong Wing* v. *United States*, 163 U.S. 228, 235-238 (1896) (invalidating a statute that provided, without a criminal trial, for aliens to be confined at hard labor for one year before being deported); compare *Allen* v. *Illinois*, 478 U.S. 364, 368-369 (1986) (upholding statute that provided for involuntary civil commitment of "sexually dangerous

persons"); *United States* v. *Ward*, 448 U.S. 242, 248-251 (1980) (upholding statute that imposed civil penalties on parties responsible for the discharge of hazardous substances).[3]

If the government were to invoke such a pervasively penal civil statute against a person who already has been criminally tried for the same offense, it would effectively place him "twice in jeopardy," in violation of the Fifth Amendment. Civil forfeiture statutes, however, have never been viewed as having that effect. This Court has often rejected the claim that statutes providing for the *in rem* civil forfeiture of property are so punitive that they may only be enforced after a criminal trial, or that they place a property owner "in jeopardy." Indeed, because laws authorizing the *in rem* civil forfeiture of property involved in criminal activity—from violations of customs and imposts laws to piracy—were among the earliest statutes enacted by Congress, see *United*

[3] In *Kennedy* v. *Mendoza-Martinez*, the Court identified several factors that, though "neither exhaustive nor dispositive" (*United States* v. *Ward*, 448 U.S. at 249), provide useful guideposts in determining whether particular statutory sanctions are so punitive that they may be imposed only after a criminal prosecution (372 U.S. at 168-169) (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

States v. *92 Buena Vista Ave.*, 113 S. Ct. 1126, 1131-1132 (1993) (plurality opinion of Stevens, J.); see also *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), they repeatedly "have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938).

Thus, in *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931), the Court unanimously rejected the contention that the prior conviction of property owners for defrauding the government of liquor taxes barred the forfeiture of property—a distillery, a warehouse, and a denaturing plant—used in the commission of the fraud. *Id.* at 580. The Court reasoned that the forfeiture was an *in rem* civil proceeding against the property, rather than "a criminal prosecution [in which] it is the wrongdoer in person who is proceeded against, convicted and punished." *Id.* at 581. The Court accordingly concluded that "[t]he forfeiture is no part of the punishment for the criminal offense," and that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply." *Ibid.*; see also *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 403-404 (1878).[4] Seven years

[4] *Various Items* was decided on the same day as *United States* v. *La Franca*, 282 U.S. 568 (1931). In that case, the Court, to avoid a constitutional issue, unanimously construed a statute that authorized a civil action to recover certain taxes, which the Court viewed as penalties, as not permitting such recovery after conviction of the defendant for a criminal offense arising from the same transactions. Justice Sutherland, who wrote for the Court in both cases, after adverting

later, the Court decided *Helvering* v. *Mitchell*, *supra*, which presented the question whether a proceeding to collect an income tax deficiency and a 50% penalty for fraud was "essentially criminal." 303 U.S. at 400. In rejecting that claim, the Court explained that, "[i]n spite of their comparative severity," customs forfeitures had been held "enforcible by civil proceedings," *ibid.*, and that tax penalties are likewise "remedial" sanctions because "[t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud," *id.* at 401.

More recently, in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), the Court rejected the notion that the Double Jeopardy Clause barred a forfeiture of property smuggled into the United States after the acquittal of the person charged with illegally importing the property. Relying on *Helvering* v. *Mitchell*, *supra*, the Court held that "the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." 409 U.S. at 235. The Court found that the forfeiture, "a civil sanction," was properly characterized as remedial because "[i]t prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." *Id.* at 236-237; see also *Calero-Toledo*, 416

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to *La Franca* in *Various Items*, noted that such considerations did not apply to "a proceeding *in rem* to forfeit property used in committing an offense." *Various Items*, 282 U.S. at 580.

U.S. at 687 n.26 ("forfeiture statutes also help compensate the Government for its enforcement efforts"); *Van Oster* v. *Kansas*, 272 U.S. 465, 466 (1926) (property used to violate the law may be regarded as a "common nuisance").

The Court unanimously reaffirmed its longstanding view of *in rem* forfeitures in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984). After examining the factors outlined in *Mendoza-Martinez*, *supra*, and *Ward*, *supra*, the Court held that the Double Jeopardy Clause did not bar a civil *in rem* action to forfeit firearms "involved in or used or intended to be used in" violations of the Gun Control Act of 1968 following the owner's acquittal of related violations of that Act. 465 U.S. at 362-366. The *89 Firearms* Court explained that, "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." *Id.* at 362. In concluding that the *in rem* proceeding could not fairly be viewed as a second criminal prosecution, the Court noted that Congress intended the forfeiture to be a civil remedy, *id.* at 363, that the forfeiture provisions "were meant to be broader in scope than the criminal sanctions," *id.* at 364, since they provided for forfeiture of property "involved in or used *or intended to be used in*" violations of law, *id.* at 363, and that the statute furthered the "broad remedial aims" of "discouraging unregulated commerce in firearms and * * * removing from circulation firearms that have been used or intended for use outside regulated channels of commerce," *id.* at 364. Because the forfeiture served goals "plainly more remedial than punitive," *ibid.*, and the claimant "failed to establish by the 'clearest proof'" (*id.*

at 366) that the statute was "so punitive either in purpose or effect" as to negate Congress's intent "to establish a civil remedial mechanism," *id.* at 365, the Court concluded that the forfeiture was "not an additional penalty for the commission of a criminal act, but rather [was] a separate civil sanction, remedial in nature[,] * * * [that was] not barred by the Double Jeopardy Clause," *id.* at 366.

3. The foregoing cases establish that *in rem* civil forfeiture proceedings under the statutes at issue in these cases cannot be viewed as criminal prosecutions barred by the "multiple prosecutions" component of the Double Jeopardy Clause. Indeed, the Ninth Circuit conceded that under *89 Firearms* "the law was clear" (95-346 Pet. App. 13a) that respondents Arlt and Wren could not secure dismissal of the forfeiture action on double jeopardy grounds. The Ninth Circuit believed (and the Sixth Circuit, in adopting the Ninth Circuit's analysis, presumably agreed, see 95-345 Pet. App. 9a-11a), however, that this Court "changed its collective mind" in three cases decided after *89 Firearms*. See 95-346 Pet. App. 13a.

First, the Ninth Circuit believed that in *United States* v. *Halper*, 490 U.S. 435 (1989), this Court "abandoned the * * * approach" of *Ward* and *Mendoza-Martinez*, which focuses on whether an entire statute is so inherently punitive that its provisions could be enforced only in a criminal trial. In the Ninth Circuit's view, *Halper* adopted instead a new, more expansive definition of "punishment" to be applied on a case-by-case basis. 95-346 Pet. App. 13a-14a. Under that new definition, the court believed that a civil sanction that cannot be said to serve "solely" a remedial purpose, but which also acts as a

deterrent, is "punishment." *Id.* at 14a. Second, the Ninth Circuit concluded that in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), an Excessive Fines Clause case, this Court abandoned *Halper*'s case-by-case approach and adopted a "categorical" analysis. That analysis retains the "new-found wisdom" of *Halper*'s expansive definition of "punishment," 95-346 Pet. App. 14a, but applies it "to the entire scope of the statute which the government seeks to employ," *id.* at 16a. The third case, *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), was read by the Ninth Circuit as "compell[ing]" its interpretation of *Austin* and *Halper*. See 95-346 Pet. App. 25a.

As we demonstrate next, that analysis of this Court's cases since *89 Firearms* is unsound. It fails to recognize that *Halper* invoked an established doctrine of double jeopardy law—the prohibition of multiple punishments—that by then had developed subject to important limitations. In particular, that branch of double jeopardy law has never been a doctrine that speaks to punishment *simpliciter*, but rather one that comes into operation only when a criminal defendant has been placed "in jeopardy"—*i.e.*, at risk of conviction for a criminal offense. The protection against multiple punishments is a *consequence* of jeopardy, as this Court's cases have defined that term, not a *substitute* for it, as both courts below supposed. Nothing in *Austin* or *Kurth Ranch* changes that understanding.

B. The Courts Below Misconstrued *Halper*, And This Court's Decisions Since *Halper*, By Failing To Recognize The Limits Of This Court's "Multiple Punishments" Cases

1. The doctrine that the Double Jeopardy Clause prohibits the imposition of "multiple punishments" originated in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). The defendant in that case had been convicted of a crime for which Congress had authorized a sentence of a $200 fine *or* a one-year prison term, but not both. The trial court, however, mistakenly sentenced Lange both to the maximum fine *and* to a one-year prison term. After Lange had paid the fine, the money had passed into the Treasury, and Lange had served five days of the prison sentence, he sought a writ of habeas corpus from the trial court. *Id.* at 164, 175. The trial court attempted to vacate the earlier judgment of conviction and to enter a new sentence of one year's imprisonment from the date of the second judgment. *Id.* at 175. On the defendant's original application for habeas corpus, this Court ordered him released.

The Court noted that, if the second sentence were enforced, the prisoner would pay $200, serve a year in jail, "and five days' imprisonment in addition." 85 U.S. (18 Wall.) at 175. That result was objectionable on two separate but related grounds. First, when the trial court originally imposed sentence, it had lacked the statutory authority to impose both a fine and imprisonment. Second, once the prisoner fully served either lawful half of the first-imposed sentence, "the power of the court to punish further was gone." *Id.* at 176; accord *Bozza* v. *United States*, 330 U.S. 160, 167 n.2 (1947). The Court justified that conclusion

by invoking not only "the well-settled principles of the common law," 85 U.S. (18 Wall.) at 178; see also *id.* at 176, but also the Double Jeopardy Clause. As to the latter, the Court reasoned that the constitutional protection would be of little value "if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." *Id.* at 173; see also *In re Bradley*, 318 U.S. 50 (1943).

In light of *Ex parte Lange*'s reasoning, this Court has interpreted the "multiple punishments" doctrine as reflecting two distinct principles of double jeopardy law. The first principle is that the Double Jeopardy Clause prohibits a court, when it sentences a defendant in a criminal case, from imposing "greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366; see also *North Carolina* v. *Pearce*, 395 U.S. 711, 717-718 (1969). The second principle is that the Clause protects "also against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality." *Jones* v. *Thomas*, 491 U.S. 376, 385 (1989). An improper increase to a sentence would occur, for example, "where a judge imposes only a 15-year sentence under a statute that permitted 15 years to life, has second thoughts after the defendant serves the sentence, and calls him back to impose another 10 years." *Ibid.*; see *id.* at 392-394 (Scalia, J., dissenting); cf. *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980) (government may, notwithstanding *Ex parte Lange*, appeal a criminal sentence where such action is authorized by statute, since such statute

gives notice that district court's sentence is not final); *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 30-31 (1985) (per curiam) (same; remanding for inquiry into whether State law authorized prosecution's appeal); *United States* v. *Martin Linen Supply Co.*, 430 U.S. at 569 n.6 (noting that, as interpreted in *Ex parte Lange*, "[t]he Double Jeopardy Clause * * * accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense").[8]

2. *United States* v. *Halper*, *supra*, was an extension of the second principle of *Ex parte Lange*—*i.e.*, the rule that a judgment of conviction in a criminal case, once it has become final and unappealable, may not be modified so as to increase the sentence already imposed. Halper was criminally prosecuted and convicted in 1985 of violating the false-claims statute, 18 U.S.C. 287 (1982), by submitting 65 inflated Medicare claims that each charged $12 for what was really a $3 procedure. He was sentenced to two years' imprisonment and fined $5,000. 490 U.S. at 437 & n.2.

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[8] To the extent that *Martin Linen* read *Ex parte Lange* as requiring "nonappealable" finality for the sentence reflected in a judgment of conviction, see also *United States* v. *Benz*, 282 U.S. 304, 307 (1931), this Court's later decision in *DiFrancesco* rejected that view. While an appellate increase in the sentence imposed by the trial court might be viewed as a second "punishment" in a subsequent "proceeding," the Court held that the defendant can have no legitimate expectation of finality when a statute authorizes the government's appeal, so that the hearing of the appeal amounts "at the most [to the second part of] a two-stage sentencing procedure." *United States* v. *DiFrancesco*, 449 U.S. at 140 n.16.

The government later sought civil sanctions based on the same inflated claims under 31 U.S.C. 3729-3731 (1982), a "fixed-penalty-plus-double-damages provision[]" of the type that "in the ordinary case * * * can be said to do no more than make the Government whole." 490 U.S. at 438, 449. That statute required for each violation a penalty of $2,000, an additional amount equal to two times the government's damages, and the costs of the civil action. *Id.* at 438. Because of his numerous violations, however, "Halper * * * appeared to be subject to a statutory penalty of more than $130,000." *Ibid.* The district court refused to enter judgment in that amount, reasoning that a penalty "more than 220 times greater than the Government's measurable loss qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." *Id.* at 439-440. On the government's direct appeal, this Court agreed with that conclusion.

The Court framed the issue as whether "in a particular case a civil penalty * * * may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U.S. at 442. In answering that question, the Court carefully distinguished the approach it had taken in *Ward* and similar cases, which, the Court explained, "is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter." *Id.* at 447. By contrast, the Court noted, "the Double Jeopardy Clause's proscription of multiple punishments * * * is intrinsically personal," *ibid.*, and "requires a particularized assessment of the penalty imposed and the purposes that the penalty

may fairly be said to serve," *id.* at 448. The Court concluded that "the labels 'criminal' and 'civil' are not of paramount importance" in that inquiry, since "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 & n.7. The Court accordingly

> h[e]ld that under the Double Jeopardy Clause a defendant *who already has been punished in a criminal prosecution* may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-449 (emphasis added). That holding, the Court emphasized, was "a rule for the rare case," in which a defendant is subjected to a sanction so "overwhelmingly disproportionate to the damages he has caused" that "it constitutes a second punishment." *Id.* at 449, 450.

The Court's holding demonstrates that, "[w]hatever else may be said about" *Halper*, "it d[id] not alter the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass* v. *United States*, 420 U.S. at 393. *Halper* did not hold that a "punishment" imposed in a civil proceeding is a "jeopardy" that triggers protection against a later criminal prosecution. Nor did *Halper* hold that whether a proceeding is properly characterized as criminal in nature is *irrelevant* to applicability of the Clause's protections. Instead, *Halper* held that, *when* the defendant has been criminally

prosecuted and punished, the finality branch of the multiple punishments doctrine precludes an increase in the defendant's sentence even when, as a formal matter, the additional punishment would result from a civil statute that is nonpunitive in the great majority of its applications.

The multiple punishments principle that has developed from *Ex parte Lange* to *Halper* turns on the notion that criminal convictions and their resulting sentences, at some point, achieve a degree of finality that is worthy of societal protection. Those cases express the view that once the government has exacted a punishment through the criminal process and has obtained a final judgment, a defendant may not be called upon to bear a second punishment for the same offense, whether the punishment be explicitly criminal, as in *Lange*, or so punitive as to amount to the same result, as in *Halper*. While the use of the Double Jeopardy Clause to protect against multiple punishments has been questioned, see *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. at 1955-1959 (Scalia, J., dissenting), what has not been questioned is that the doctrine, as formulated, takes as its predicate an *initial* "jeopardy"—a risk of criminal conviction before a body competent to decide the question of guilt or innocence. In describing the consequences of a final criminal judgment, the doctrine thus belongs to the constitutional "common law" that pertains to the rights that follow from being placed in "jeopardy" in a criminal case. Compare *Ashe* v. *Swenson*, 397 U.S. 436 (1970) (Double Jeopardy Clause embodies "collateral estoppel" doctrine).

In keeping with that understanding, *Halper* repeatedly emphasized the fact of the earlier criminal prosecution, see 490 U.S. at 441, 448-449, 449, and

explained that, "*when the Government already has imposed a criminal penalty* and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding," *id.* at 451 n.10 (emphasis added). And the Court concluded by stating that "the *only* proscription established by [its] ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 451 (emphasis added).

Nothing in *Austin* v. *United States*, *supra*, changes the conclusion that an initial "jeopardy"—*i.e.*, a prior criminal prosecution—is a prerequisite to the invocation of the Double Jeopardy Clause. *Austin* did not involve the Double Jeopardy Clause at all. It held that the civil forfeiture provisions at issue in that case (21 U.S.C. 881(a)(4) and (7)) triggered the applicability of the Eighth Amendment's Excessive Fines Clause. The Court expressly distinguished two of its double jeopardy precedents concerning the forfeiture of contraband or goods involved in customs violations, after noting that the forfeitures in both of those cases were remedial. 113 S. Ct. at 2811-2812 (citing *89 Firearms*, 465 U.S. at 364, and *One Lot Emerald Cut Stones*, 409 U.S. at 237). The *Austin* Court did rely on *Halper* in assessing whether *in rem* civil forfeitures could be viewed as a "punishment" that triggers the protections of the Eighth Amendment. 113 S. Ct. at 2805-2806, 2810 n.12, 2812. But *Austin* did not purport to alter *Halper*'s double jeopardy holding as a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a [civil] sanction overwhelmingly disproportionate to the damages he has caused," after having been criminally prosecuted and punished. 490 U.S. at 449.

Department of Revenue of Montana v. *Kurth Ranch*, *supra*, the third case on which the Ninth Circuit relied, does not support, much less "compel[]," 95-346 Pet. App. 25a, that court's interpretation of *Halper* and *Austin*. *Kurth Ranch* mentioned *Austin* only in passing to describe *Austin*'s Eighth Amendment holding, 114 S. Ct. at 1945, and actually held that *Halper* did *not* furnish the proper framework for analyzing the issue before the Court, which was whether the Double Jeopardy Clause barred collection of Montana's tax on the possession of dangerous drugs after the "taxpayers" had been criminally prosecuted and punished. *Id.* at 1948. The Court struck down the tax based on several "unusual features" in the statute that authorized it, which "[t]aken as a whole" rendered the tax "a concoction of anomalies." *Id.* at 1947, 1948. Specifically, the Court found it significant that the statute conditioned liability on commission of a crime, that the tax was due and collectable "only after the taxpayer ha[d] been arrested for the precise conduct that gives rise to the tax obligation in the first place," that the tax was an *in personam* sanction that was exacted after the drugs had been confiscated and destroyed, and that the tax amounted to more than eight times the market value of the drugs. *Id.* at 1947. As the Court noted, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakably punitive character" especially when it is "imposed on criminals and no others." *Id.* at 1948.

Those "exceptional" (114 S. Ct. at 1948) features persuaded the Court that the proceeding to collect the tax "was the functional equivalent of a successive criminal prosecution that placed the [taxpayers] in jeopardy a second time 'for the same offence' " for which they had previously been criminally prosecuted. *Ibid.* That holding of *Kurth Ranch*, and the Court's conclusion that the *Halper* test was inapplicable, suggest that the Court viewed the proceeding to collect the tax as "essentially criminal," see *Helvering* v. *Mitchell*, 303 U.S. at 400, and thus that it violated the Double Jeopardy Clause's prohibition on successive criminal *prosecutions*. *Kurth Ranch* therefore may be best understood as falling into the long line of decisions, including *Mitchell*, *Mendoza-Martinez*, and *Ward*, that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied. It does not signal a departure from the case-by-case approach adopted in *Halper* in the multiple punishments context, which requires an assessment of the purposes served by a particular sanction as applied to the case at hand. Still less does *Kurth Ranch* dispense with a prior criminal "jeopardy" as a prerequisite for invoking multiple punishments analysis.

The Court's most recent double jeopardy decision, *Witte* v. *United States*, 115 S. Ct. 2199 (1995), also undermines the broad reading of *Halper* and *Kurth Ranch* adopted by the courts below, because it confirms that those cases do not change the long-standing rule that a person must first suffer the risk of conviction for a crime before he may claim any double jeopardy violation. Witte was first convicted of attempting to possess marijuana with intent to distribute it. His sentence for that offense was increased

on the basis of the trial judge's finding that he had also participated in cocaine importation offenses. When Witte was later separately indicted for those cocaine offenses, he sought dismissal of the charges on the ground that he had already been "punished" for them during the sentencing on the marijuana charge. Although Witte relied on *Halper* and *Kurth Ranch*, see Brief for Petitioner at 32-34, *Witte* v *United States*, No. 94-6187 (O.T. 1994), and a broad interpretation of those cases could have supported his claim, see *Witte* v *United States*, 115 S. Ct. at 2209-2210 (Scalia, J., concurring in the judgment); *id.* at 2212-2213 (Stevens, J., concurring in part and dissenting in part), this Court rejected it. The Court noted that Witte "clearly was neither prosecuted nor convicted of the cocaine offenses during the first criminal proceeding," *id.* at 2204, and concluded that he also was not "punished" for those offenses when his earlier sentence was increased, because "for double jeopardy purposes" he could be deemed to have suffered " 'punishment' * * * only for the offense of which [he was] convicted," *id.* at 2205; see also *id.* at 2206. In other words, because Witte was not at risk of conviction for the cocaine offenses when he was sentenced on the marijuana charge, he had failed to meet the threshold predicate for either a multiple prosecutions or a *Halper* multiple punishments claim.

3. The foregoing analysis demonstrates that the Sixth Circuit fundamentally erred by concluding that "jeopardy attached" when respondent Ursery settled the civil forfeiture action, and that this "jeopardy" barred the later jury trial on the criminal charges against him. 95-345 Pet. App. 6a-9a. As we have explained, the concept of "jeopardy" requires a proceeding in which a defendant risks conviction for a

criminal offense, with all the unique consequences that attend that societal judgment. Only a defendant who has suffered that particular type of "intrinsically personal" (*United States* v. *Halper*, 490 U.S. at 447) risk may thereafter lay claim to the "constitutional policy of finality * * * in federal criminal proceedings" (*United States* v. *Jorn*, 400 U.S. at 479 (plurality opinion of Harlan, J.)) that the Double Jeopardy Clause represents. The consent judgment entered in the *in rem* action involving respondent Ursery's property did not subject him to that sort of risk of a criminal trial or punishment; it merely concluded a civil action involving his property.

The Sixth Circuit drew an analogy between that consent judgment and a guilty "plea entered pursuant to a plea agreement." 95-345 Pet. App. 7a. A plea of guilty to a criminal offense, however, "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Because Ursery was not placed "in jeopardy" by the judgment entered in the *in rem* civil forfeiture action, he did not meet the threshold requirement for the applicability of *Halper*'s multiple punishments analysis or any other double jeopardy claim. The Sixth Circuit accordingly erred in ordering the dismissal of his later judgment of conviction on double jeopardy grounds.

C. The *In Rem* Civil Forfeitures In These Cases Did Not Impose "Punishment" For Purposes Of The Multiple Punishments Inquiry

The Sixth and Ninth Circuits concluded that the civil forfeiture statutes at issue here necessarily and categorically inflict "punishment" on property owners for purposes of the Double Jeopardy Clause. As we

have shown, under this Court's cases, a "multiple punishments" inquiry is relevant only when a defendant has been criminally prosecuted, convicted, and sentenced. Accordingly, the inquiry should not have been undertaken at all in *Ursery*. Even if such an inquiry were appropriate, however, neither the forfeiture of the property used to facilitate the narcotics crimes in *Ursery* nor the property forfeited as proceeds of narcotics-related crimes in *$405,089.23* should be characterized as "punishment" for purposes of the Double Jeopardy Clause.

1. *The forfeiture of the facilitating property in* Ursery *is not punishment.* Under *United States* v. *Halper*, the issue whether a particular civil sanction amounts to "punishment" within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purposes. 490 U.S. at 448. In our view, the proper inquiry in the multiple punishments context is whether, as applied in a particular case, the sanction is rationally related to legitimate remedial aims. In the case of the forfeiture of property that facilitates a crime, we believe that the sanction should generally be regarded as remedial.

a. The "hold[ing]" of *Halper* is that a civil sanction is punitive if it "may not fairly be characterized as remedial, but *only* as a deterrent or retribution." 490 U.S. at 448-449 (emphasis added). Under the holding of *Halper*, a dominant remedial purpose renders a sanction nonpunitive for purposes of the Double Jeopardy Clause, even if the sanction could also be said, in some respects, to act as a deterrent. Thus, *Halper* adopted a "rational-relationship requirement," whereby a sanction is deemed punitive when it "is not rationally related to the [nonpunitive] goal" that it purports to serve. *Id.* at 451 & n.12;

compare *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979) ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment"); *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987).

Some language in *Halper* may be read to suggest that a civil sanction with *any* deterrent purpose should be viewed as "punishment." 490 U.S. at 448.[6] In our view, that formulation would sweep too broadly. Such a conception of punishment is not supported by the precedent on which *Halper* relied.[7] And a "test"

[6] The Court stated:

> [w]e have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. *Halper*, 490 U.S. at 448.

[7] The authorities cited by *Halper* in the passage quoted at note 6, *supra*, do not require the conclusion that the presence of a deterrent component in a sanction having multiple purposes is "punishment." *Mendoza-Martinez* listed factors relevant to whether a statute is so penal that it must be viewed as imposing criminal punishment; one of those factors is whether the statute's operation promotes retribution and deterrence. *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the second case cited by *Halper*, used the *Mendoza-Martinez* factors as guideposts to determine whether particular practices of prison

that considers any deterrent purpose to qualify a civil sanction as punishment diverges from the carefully circumscribed approach taken in *Halper*. There are few, if any, civil sanctions that do not serve *in part* to deter, and many are deliberately employed in part for that purpose. The view that any deterrent element means punishment would be inconsistent with the *Halper* Court's own emphasis on the limited scope of its ruling. See *id.* at 449, 450; see also *Kurth Ranch*, 114 S. Ct. at 1946.

Austin, however, relied on the broader formulation in *Halper* in holding that the forfeiture of property used to facilitate narcotics offenses is sufficiently punitive to warrant application of the Eighth Amendment's prohibition of excessive fines. 113 S. Ct. at 2806, 2810 & n.12, 2812. After noting various historical and contemporary features of forfeiture statutes that it viewed as signaling a punitive purpose,[8]

administrators were "punishment." While the Court in *Bell* v. *Wolfish* did state generally that retribution and deterrence are punitive purposes, its overall test for measuring the nature of a sanction did not require that *any* element of deterrence makes a sanction punitive. Rather, *Bell* v. *Wolfish* states: "[I]f a particular condition or restriction * * * is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" 441 U.S. at 539.

[8] *Austin* found that *in rem* forfeitures "historically have been understood, at least in part, as punishment," 113 S. Ct. at 2810, and that nothing in 21 U.S.C. 881(a)(4) and (7) affirmatively dispelled that understanding. On the contrary, the Court noted that those subsections contain innocent-owner defenses that "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment," that Congress "has chosen to tie forfeiture directly to the commission of drug offenses," and that the legislative

the Court stated that, even on the assumption that forfeiting the instrumentalities of crime serves "some remedial purpose," the Eighth Amendment would still apply to those forfeitures because the Court could not conclude that they "serve[] *solely* a remedial purpose." *Id.* at 2812 (emphasis added). The Court should not apply that test here.

The sole question in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applies to *in rem* forfeitures, and the Court could have answered that question without reference to *Halper*'s language at all. The dictionary definition of a "fine" —a "payment to a sovereign as punishment for some offense," 113 S. Ct. at 2812—does not require that punishment be the *sole* reason for a particular levy, and the Court concluded that the Framers understood the words "fine" and "forfeiture" to be synonymous. *Id.* at 2808 & n.7. Moreover, *Austin* expressly recognized that it "ma[d]e little practical difference" in that case whether the Excessive Fines Clause were held to apply to all forfeitures under the statutes at issue in that case, "or only to those that cannot be characterized as purely remedial." *Id.* at 2812 n.14. The practical consequences of applying the Eighth Amendment occur only when a fine is excessive, and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." *Ibid.*

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history of those provisions characterized them as a "powerful deterrent." 113 S. Ct. at 2810-2811. The Court was also unpersuaded that conveyances used to commit drug crimes can be compared to "contraband," the forfeiture of which is concededly remedial, or that the forfeiture of such property furnishes a reasonable form of liquidated damages, since its value may vary dramatically. *Id.* at 2811-2812.

The extension of *Austin*'s reasoning, however, to the double jeopardy setting would have significant practical consequences. In that setting, a categorical conclusion that all civil forfeitures under the statute at issue constitute punishment would defeat the case-by-case approach adopted in *Halper* itself.[9] It could also completely bar a later criminal prosecution of the property owner, even if the *particular* prior civil forfeiture were fairly characterized as substantively remedial. That result would greatly expand *Halper*'s rule "for the rare case." 490 U.S. at 449. And if *Austin*'s formulation were extended to other contexts, it could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper, see, *e.g.*, *State* v. *Hickam*, 668 A.2d 1321 (Conn. 1995) (double jeopardy challenge to DWI prosecution that followed suspension of motorist's license), would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable. Cf. *Sandin* v. *Conner*, 115 S. Ct. 2293, 2300 & n.5 (1995).[10]

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[9] Under *Halper*'s approach, only so much of a sanction as constitutes punishment would be barred by a criminal conviction for the same offense. 490 U.S. at 449-450, 452; cf. *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986). Under the categorical approach, *all* of the sanction would presumably be barred.

[10] That the analysis of whether punishment is imposed may differ in the excessive fines and double jeopardy contexts is consistent with this Court's general treatment of forfeiture issues. Indeed, if anything is clear from this Court's cases, it is that this Court's characterization of forfeiture as either punitive or remedial has depended upon the specific legal context in which that question arose. Thus, in *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), and *United States* v. *United*

The mainstream of this Court's cases supports *Halper*'s actual holding that a sanction is punitive only if it cannot rationally be explained by reference to a nonpunitive interest. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. at 539. Just one Term after *Austin*, the majority in *Kurth Ranch* recognized that in the double jeopardy context even "an obvious deterrent purpose" does not necessarily mark government practices as "punishment." 114 S. Ct. at 1946. Two of the dissenting Justices in *Kurth Ranch*, who voted for the result in *Austin*, expressly reaffirmed the more limited formulation reflected in *Halper*'s holding. See *id.* at 1952 (Rehnquist, C.J., dissenting) ("[T]he proper inquiry is * * * whether [the tax] is so high that it can only be explained as serving a punitive purpose"); *id.* at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective").

In addition, while *Austin* relied on several factors in concluding that the forfeiture of instrumentalities of drug crimes is sufficiently punitive to trigger

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States Coin & Currency, 401 U.S. 715, 718 (1971), the Court characterized forfeiture as "criminal in nature" for purposes of determining whether a claimant in a forfeiture action could invoke the Fifth Amendment privilege against self-incrimination. See also *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700-702 (1965) (finding, in light of forfeiture's role as a penalty, that Fourth Amendment's exclusionary rule applies). Subsequently, however, in *One Lot Emerald Cut Stones* and *89 Firearms*, the Court reaffirmed the rule that *in rem* forfeitures serve substantial remedial ends and do not constitute punishment for double jeopardy purposes.

Eighth Amendment scrutiny, those factors have never traditionally been held sufficient to brand such forfeitures as punitive for purposes of the Double Jeopardy Clause. For example, while a statutory innocent-owner defense is of relatively recent vintage, equivalent administrative mitigation remedies that depend on the absence of "willful negligence" on the part of property owners have been available since 1790. See *Calero-Toledo*, 416 U.S. at 689 n.27. Similarly, a historical understanding of a particular sanction as "punishment" is one of the several *Mendoza-Martinez* factors that this Court in *89 Firearms* concluded was *not* implicated by an *in rem* forfeiture. See *89 Firearms*, 465 U.S. at 365 & n.7. Finally, while forfeitures of "facilitating property" are tied to the commission of certain crimes, their scope is much broader because they apply to property "intended" to be used in those crimes even if such an "intent" is not itself a crime. Cf. *id.* at 363-364. In any event, under *Halper* the last-mentioned factor merits minimal weight in the double jeopardy calculus, because in that case the defendant became liable for a civil penalty only after engaging in conduct that also constituted a crime, see *United States* v. *Halper*, 490 U.S. at 438; see also *United States ex rel. Marcus* v. *Hess*, 317 U.S. at 549; *Murphy* v. *United States*, 272 U.S. 630, 632 (1926) (Holmes, J.), yet the Court nevertheless concluded that a civil penalty amounts to punishment only when it is so disproportionate to the government's claimed interest in compensation that it cannot rationally be justified, on a case-by-case basis, by reference to that interest. 490 U.S. at 449.[11]

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[11] The Court in *Austin* also consulted the legislative history of the drug forfeiture statutes, noting that the Senate Report

b. Applying *Halper*, the appropriate case-by-case inquiry in the context of forfeitures of property used to facilitate narcotics crimes is whether the nexus between the particular property and the crime committed or intended is close enough so that the forfeiture may rationally be thought to further one or more of the remedial goals that traditionally have justified that *in rem* remedy. Those goals are (1) inducing owners to exercise all reasonable care in managing their property, see, *e.g.*, *Calero-Toledo*, 416 U.S. at 687-688; *Van Oster*, 272 U.S. at 467-468; (2) abating a nuisance or wrong,[12] see, *e.g.*, *Dob-*

had characterized the forfeiture of real property used for drug storage or manufacture as a "powerful deterrent." 113 S. Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)). As we argue above, however, the presence of some deterrent objective should not result in civil forfeiture being deemed categorically punitive for double jeopardy purposes.

[12] The reported cases provide graphic examples of the use of 21 U.S.C. 881(a)(7) to meet this traditional objective of *in rem* forfeitures. In *United States* v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), nearly an entire apartment building was used to sell crack cocaine, and persistent efforts to compel the legal owners of the building to remedy the situation had failed. See *id.* at 873. Similarly, conveyances forfeitable under 21 U.S.C. 881(a)(4) may be specially adapted to smuggle drugs, and the removal of such a conveyance from commerce undeniably serves a remedial purpose. See *United States* v. *One 1983 Homemade Vessel Named "Barracuda"*, 858 F.2d 643 (11th Cir. 1988); cf. *United States* v. *Chandler*, 36 F.3d 358, 364 (4th Cir. 1994) ("Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness"), cert. denied, 115 S. Ct. 1792 (1995).

bin's Distillery, 96 U.S. at 400; *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844); and (3) "insuring an indemnity to the injured party," *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) at 233; see *Republic National Bank* v. *United States*, 506 U.S. 80, 87 (1992) (*in rem* forfeiture developed, in part, "to furnish remedies for aggrieved parties"). The last objective —compensating an injured party—extends as well to the government, see *United States ex rel. Marcus* v. *Hess*, 317 U.S. at 551, which may fairly ask that each person whose property contributes to the harms caused by drug trafficking also contribute to defraying the government's costs of enforcement and the societal harms created by that activity. Cf. *Halper*, 490 U.S. at 446 n.6 (government may recover its "investigative and prosecutorial costs"); *Kurth Ranch*, 114 S. Ct. at 1953-1954 (O'Connor, J., dissenting); *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2d Cir.) (government may be allowed "[a] reasonable allocation of more generalized enforcement costs—in the nature of overhead"), cert. denied, 506 U.S. 815 (1992).

In general, we believe that the forfeiture of the instrumentalities of crime is a rational means to achieve those remedial goals, and that it would take a "rare case," *Halper*, 490 U.S. at 449, to establish otherwise.[13] Such a rare case might occur if

[13] In the course of its Eighth Amendment analysis, the *Austin* Court did express doubt that, as a categorical matter, the forfeiture of instrumentalities of crime could be characterized as remedial. 113 S. Ct. at 2811. The Court declined to equate conveyances and buildings involved in drug crimes

extremely valuable property were minimally involved in the offense, such that the forfeiture would be rationally explicable only on the basis that it is intended to impose punishment for the purposes of the Double Jeopardy Clause. Short of that situation, however, a court should not reach the conclusion that a forfeiture of facilitating property is punitive for double jeopardy purposes.

In light of those principles, respondent Ursery cannot meet his initial burden (*United States* v. *Halper*, 490 U.S. at 449) of establishing that the government's action in seeking forfeiture of his property was apparently punitive. Because respondent used the property for several years to process and distribute a controlled substance, it significantly furthered the harms occasioned by drug trafficking. And because respondent made no showing that a forfeiture valued at $13,250 represented a recovery "exponentially" in excess of the government's likely costs of enforcement, see *id.* at 445, the government's action in seeking its forfeiture appears rationally to serve the traditional remedial goals of *in rem* forfeiture. Nothing in that action, therefore, suggests that the

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to "contraband," and it found that the value of the property forfeitable on an instrumentality theory has no correlation to the harm caused by the underlying offense or to the costs of law enforcement. *Id.* at 2811-2812. On the case-by-case analysis applicable in the double jeopardy multiple punishments setting, see *United States* v. *Halper*, 490 U.S. at 452, however, the forfeiture of particular property may be integrally tied to the eradication of drug crime (see note 12, *supra*), and the nexus between the property's value and the costs of law enforcement may provide the "rough remedial justice," *id.* at 446, to which the government is entitled. Those purposes would characterize the forfeiture as remedial.

forfeiture could rationally be explained only as an attempt to inflict punishment.

2. *The forfeiture of proceeds is not punishment.* Even if the Court disagrees with our submission that *Austin* does not control the punishment question presented in *Ursery*, and holds that the civil action in that case inflicted "punishment" for double jeopardy purposes, we believe that a different conclusion nonetheless is required in *$405,089.23*. The district court in that case granted summary judgment in our favor on the ground, among others, that the assets at issue were "proceeds" of narcotics trafficking. See Pet. App. 3a-4a. As a plurality of this Court recognized in *92 Buena Vista Ave.*, *supra*, statutes authorizing the forfeiture of "proceeds" are a recent development in forfeiture law. See 113 S. Ct. at 1133-1134 & n.16 (noting that first such statute was enacted in 1978). Accordingly, *Austin*'s historical analysis of *in rem* forfeitures as being "in part" punitive (113 S. Ct. at 2810) does not speak to this category of relief sought by the government.

The "forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property." *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994); cf. *92 Buena Vista Ave.*, 113 S. Ct. at 1133 n.15 (noting that "stolen property—the fruits of crime—was always subject to seizure" under the Fourth Amendment); *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617, 626 (1989) ("[T]he Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense"). When the government forfeits

such proceeds, it does no more than prevent unjust enrichment, a plainly remedial goal. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995) (disgorgement order in civil RICO case is not "punishment" for double jeopardy purposes because "[d]isgorgement, by design, is compensatory"), cert. denied, No. 95-6929 (Feb. 20, 1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement of profits made during securities law violation is purely remedial); see also *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153-154 & n.6 (1956). Any other view would lead to the absurd result that a bank robber who is arrested as he exits the bank, and from whom the stolen money is seized at that time, may not thereafter be prosecuted for the robbery.

As the Fifth Circuit has explained,

> [w]hen * * * the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. * * * The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.

United States v. *Tilley*, 18 F.3d at 300; accord *United States* v. *Salinas*, 65 F.3d 551, 553-554 (6th Cir. 1995) (following *Tilley*); *United States* v. *$184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (same); see also *United States* v. *Clementi*, 70 F.3d 997, 999-1000 (8th Cir. 1995) (rejecting Ninth Circuit's analysis); but see *United States* v. *9844 South Titan Court*, No. 94-1285, 1996 WL 49002 (10th Cir. Feb. 5, 1996). Moreover, while the Court was not persuaded in *Austin* that lawfully acquired property that is used merely to facilitate a crime should be viewed as contraband, property received in exchange for controlled substances bears a much closer nexus to the illegality and may, as Judge Rymer argued below, fairly be characterized as "the functional equivalent of contraband," 95-346 Pet. App. 27a, the forfeiture of which is "remedial." *Austin* v. *United States*, 113 S. Ct. at 2811. Finally, as the Seventh Circuit recently recognized,

> proceeds forfeitures can never be out of proportion to the "loss" suffered by the government or society. If there has been a finding that certain property, for instance, is forfeitable pursuant to § 881[a](6) as proceeds of drug trafficking, it is directly equal to that part of the profits with which it was purchased. It directly represents at least a portion of the profits and can thus be less than or equal to society's loss, but not more than the loss. * * * That being the case, the forfeiture of proceeds acquired from drug dealing can hardly be termed punishment.

Smith v. *United States*, No. 95-2259, 1996 WL 72858, at *3 (Feb. 21, 1996).

For these reasons, the Ninth Circuit's conclusion that the forfeiture of the proceeds that respondents obtained from years of drug dealing is punishment simply "has to be wrong." 95-346 Pet. App. 28a (Rymer, J., dissenting from denial of rehearing). Instead, the forfeitures at issue in *$405,089.23* are remedial, and they cannot constitute punishment under the Double Jeopardy Clause.

D. If Civil *In Rem* Forfeiture Amounts To An "Offense" For Which Respondents Were Placed In Jeopardy, It Is Not The "Same Offense" As The Crimes For Which They Were Prosecuted

1. The Double Jeopardy Clause prohibits multiple punishments or successive prosecutions only for the "same offence." The test for determining whether two offenses are the "same" for double jeopardy purposes is the "statutory elements" test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." See also *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) ("Th[e] [*Blockburger*] test emphasizes the elements of the two crimes"). Accordingly, if each statute at issue "requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); see also *United States* v. *Felix*, 503 U.S. 378, 386 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation"); *Albernaz* v. *United States*, 450 U.S. 333, 338 (1981). The *Blockburger* test applies in both the multiple punishments and successive prosecutions contexts. See *United States* v. *Dixon*, 113 S. Ct. at 2856; *Witte* v. *United States*, 115 S. Ct. at 2204.

2. A straightforward application of the *Blockburger* test compels the conclusion that, if civil forfeiture amounts to an "offense" that triggers double

jeopardy protections, as both the Sixth and Ninth Circuits have held, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of the offenses on which respondents were convicted. Each of the forfeiture statutes requires proof that the defendant property played some role in the commission of a crime. Section 981(a)(1)(A) provides for the forfeiture of "property * * * involved in a transaction or attempted transaction," in violation of four money laundering statutes. Section 881(a)(6) authorizes the forfeiture of money "furnished or intended to be furnished" in connection with, "traceable to," or "used or intended to be used to facilitate" a drug trafficking crime. Similarly, Section 881(a)(7) requires proof that the defendant real property was "used, or intended to be used, * * * to commit, or to facilitate the commission of," a drug crime.

The respondents in *$405,089.23* were convicted of conspiracy to commit drug offenses, in violation of 21 U.S.C. 846; possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371; and money laundering, in violation of 18 U.S.C. 1956. The respondent in *Ursery* was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). None of those statutes requires proof that any property was used in or generated by the offense. Because each of the forfeiture statutes does require that element of proof, each contains an element that the criminal statutes do not.

Each of the criminal statutes also requires proof of at least one element not found in the forfeiture statutes. Conviction on the criminal charges required

proof that respondents participated in a conspiracy, possessed a controlled substance with the intent to distribute it, or engaged in unlawful money laundering transactions. By contrast, the forfeiture statutes do not require proof of any particular crime, or proof of the participation of the property owner in the offenses that supported the forfeiture, much less proof that the owner entertained a mental state required for a criminal conviction.[14] See *Origet* v. *United States*, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offence may be an entirely different person from the owner of the merchandise, or any person interested in it"); *United States* v *Chandler*, 36 F.3d 358, 362 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). Indeed, because the government may obtain forfeiture under Section 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

For those reasons, there is no force to the Ninth and Sixth Circuits' view that, since forfeiture statutes "incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States* v. *One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994); see also 95-345 Pet. App. 12a. Greater- and lesser-included offenses are the "same" for double jeopardy purposes because such offenses do not satisfy the *Blockburger* test. As this Court has made clear, one statute does not define a lesser-included offense of another unless every violation of the statute defining the greater offense "*necessarily* entails a violation of" the statute defining the lesser offense. *United States* v. *Woodward*, 469 U.S. 105, 107 (1985) (per curiam) (emphasis added); *Brown* v. *Ohio*, 432 U.S. at 168 (offense is lesser-included under *Blockburger* if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); see also *Schmuck* v. *United States*, 489 U.S. 705, 716, 719 (1989). Because that quite clearly cannot be said of the purportedly "greater" civil forfeiture "offenses" at issue here, the courts below erred in concluding that those offenses are the "same" as the crimes for which respondents were convicted.[15]

[14] Thus, for example, an owner of property may be legally innocent of the crime that gives rise to the civil forfeiture, but be unable to meet the requirements of the statutory innocent-owner defense.

[15] Apart from misapplying the "elements" test of the *Blockburger* decision (*i.e.*, whether the "offenses" are the same *in law*), the Sixth Circuit in *Ursery* also ignored a second, and equally dispositive, aspect of the *Blockburger* decision, *viz.*, whether the offenses at issue are the same *in fact*. While the better-known holding of *Blockburger* is addressed to the former question, that case also held that repeated violations of the *same* statute (which obviously would be the same offense under the "elements" test) are still different "offenses" if each resulted from a fresh "impulse." *Blockburger* v. *United States*, 284 U.S. at 301-303; see also *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224-225 (1952); *id.* at 220 n.3 (referring to that aspect of *Blockburger* as addressing what the "unit of prosecution" is). Respondent Ursery was not charged with, or convicted of, manufacturing marijuana based on any theory that he grew the plants on his property, or that he did so more than once, but rather on the basis that he did so in property belonging to one of his neighbors and on a specific date—July 30, 1992. As Judge Milburn noted in dissent (95-345 Pet. App. 26a-27a; see also

E. If Respondents Were "Punished" By The *In Rem* Civil Forfeiture Proceedings For The Same Offenses That Led To Their Criminal Convictions, That Punishment Occurred In The "Same Proceeding" As The Punishment Imposed By The Criminal Judgments

Even if the forfeitures in these cases constituted "punishment" for the offenses for which the claimants were convicted, the "Double Jeopardy Clause simply is not implicated" if the criminal action was part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. at 368-369. The Ninth Circuit concluded that parallel civil forfeitures and criminal convictions, being separately docketed and tried, can never be the same proceeding. 95-346 Pet. App. 7a-12a. The Sixth Circuit did not "fully adopt" the Ninth Circuit's approach, but it did hold that the civil and criminal actions were separate proceedings because they were filed four months apart, ended in formally separate judgments entered by different judges, and were not coordinated by the government attorneys involved. 95-345 Pet. App. 16a.

The courts below misapprehended the significance of *Halper*'s reliance on the existence of "separate" proceedings. Because the multiple punishments doctrine protects a criminal defendant's legitimate "ex-

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id. at 29a), the civil forfeiture action, by contrast, was based on respondent's use of his own property to facilitate the processing and distribution of marijuana over the period of "several years" that concluded with the search of his residence.

pectation of finality in the original sentence," *United States* v. *DiFrancesco*, 449 U.S. at 139; *id.* at 137; *Pennsylvania* v. *Goldhammer*, 474 U.S. at 30; see also *United States* v. *Fogel*, 829 F.2d 77, 83-88 (D.C. Cir. 1987) (Bork, J.), a proceeding is impermissibly successive for purposes of that doctrine only when it is commenced after that expectation of finality has ripened. As demonstrated by this Court's cases upholding the government's authority to appeal criminal sentences, the time at which that expectation ripens has nothing to do with whether an increase in the defendant's sentence is ordered by a different judge, is procured by a different government attorney, or is ordered under the caption of a new docket number. Those are common occurrences upon the hearing of any sentencing appeal, and they do not render the appeal a "separate" proceeding at which punishment is impermissibly increased.

Indeed, *Halper* itself compels the conclusion that such factors cannot control whether a proceeding is impermissibly successive for purposes of the multiple punishments inquiry, because the Court expressly stated that "[n]othing in [its] ruling" would preclude the government from obtaining a "civil penalty" *and* "criminal penalties in the same proceeding." 490 U.S. at 450. Because civil and criminal actions cannot be (and never have been) joined together in a single trial under our system of justice, see *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); see also *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States* v. *Smith*, No. 95-1568, 1996 WL 34552 (8th Cir. Jan. 31, 1996), slip op. 6, *Halper* itself casts considerable doubt on the

Ninth and Sixth Circuits' approach to the question.[16] And because *Halper* specifically contemplated that the government could seek *both* civil and criminal penalties, that case also answers the Ninth Circuit's suggestion (95-346 Pet. App. 22a) that this Court's cases effectively require the government to elect whether it will proceed criminally *or* civilly.[17]

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[16] Even in the context of purely criminal proceedings, it is not invariably true that formally separate criminal trials involving the same offense amount to "separate" proceedings that trigger double jeopardy protections. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (two-tier state system, even if "technically" resulting in two trials, "can be regarded as * * * a single, continuous course of judicial proceedings" that does not implicate the concerns of the Double Jeopardy Clause); see also *Ohio* v. *Johnson*, 467 U.S. 493, 500-501 (1984) (no double jeopardy violation to continue prosecution on remaining charges in indictment after defendant chose to plead guilty to lesser-included offenses).

[17] The Ninth Circuit suggested that the government could have sought criminal forfeiture under 18 U.S. 982 and 3554 and 21 U.S.C. 853, and simply added a forfeiture count to the criminal indictment. 95-346 Pet. App. 8a-9a. The issue, however, is whether the Double Jeopardy Clause *requires* that the government do so, not whether the government might, in future cases, find ways to mitigate the Ninth Circuit's erroneous interpretation of the Constitution. Moreover, the vast majority of civil forfeiture statutes have no criminal forfeiture analogue. See U.S. Dep't of Justice, *Compilation of Selected Federal Asset Forfeiture Statutes* (Aug. 1995). As a practical matter, the Ninth Circuit's analysis requires the government to choose between a criminal sentence of imprisonment or fine, on the one hand, and civil forfeiture, on the other, even though Congress quite clearly intended for both to be available.

In any event, the Ninth Circuit overlooked the fact that forfeiture under those provisions is an *in personam* action

As with other double jeopardy questions, the relevant inquiry instead is whether the government's conduct "constitute[s] 'governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'" *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 310 (1984) (quoting *United States* v. *Scott*, 437 U.S. at 91); accord *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984); *United States* v. *DiFrancesco*, 449 U.S. at 142. In the context of the interests protected by the multiple punishments doctrine, that type of "oppression" occurs only when the government defeats the defendant's legitimate expectation of finality. The facts of these cases make clear that respondents were well aware that the government intended to seek a full complement of statutorily authorized remedies in civil and criminal actions that were basically contemporaneous. Thus, respondents had actual notice that the criminal sentence would not be the sole sanction sought by the government on the basis of their criminal conduct, and thus they could not reasonably have formed any expectation to the contrary. For that reason, the facts of these cases do not implicate *Halper*'s basic concern that the government is seeking to disturb an

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that does not uniformly achieve the ends that Congress envisioned for *in rem* forfeitures. For example, because an *in personam* forfeiture must be obtained in a criminal trial, it is not available when the criminal defendant/property owner is a fugitive from justice, whose trial may not proceed *in absentia*. See *Crosby* v. *United States*, 506 U.S. 255 (1993). Thus, under the ruling below, if a fugitive owns a crack cocaine-infested tenement, the government has the choice of abating the nuisance through a civil proceeding *in rem*, but only if it is willing to risk granting him immunity from prosecution in the event he ultimately is caught.

otherwise final criminal judgment because "it is dissatisfied" with the criminal sentence received by the defendant. *United States* v. *Halper*, 490 U.S. at 451 n.10; see also *United States* v. *Smith*, slip op. 6.

Indeed, the facts of these cases conclusively show that the government did not commence separate civil and criminal actions to defeat any expectation of finality to which respondents were legitimately entitled by virtue of the Double Jeopardy Clause. In *$405,098.23*, the government filed the forfeiture complaint five days after the claimants were charged in a superseding indictment with drug-trafficking and money-laundering offenses. Far from viewing that dual filing as an abusive tactic warranting legal relief, respondents discussed the appropriateness of staying the civil action pending the outcome of the criminal case (95-346 Pet. App. 51a). They thus evidenced not only their own inability to discern any double jeopardy injury from the government's dual filings (to which they did not object at all until the case was on appeal, see *id.* at 5a n.1) but also their willingness to deal with the criminal and civil actions seriatim. Cf. *Jeffers* v. *United States*, 432 U.S. 137, 154 (1977) (plurality opinion of Blackmun, J.).

Similarly, respondent in *Ursery* was indicted in February 1993, four months after the civil forfeiture action was commenced and long before the outcome of either case could be known. He likewise did not see in the parallel actions any danger to his double jeopardy rights. To the contrary, he elected to settle the forfeiture action, with full knowledge of the pendency of the criminal prosecution, and then stood trial on the criminal charges without raising any double jeopardy issue. It was not until after he was

convicted by a jury that he made a double jeopardy claim for the first time. See 95-345 Pet. App. 4a. The unfolding of those events may well suggest that respondent, after concluding a bargain he thought fair and equitable in the civil case and unsuccessfully trying his luck with the jury in the criminal case, turned to the Double Jeopardy Clause for the "sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) that might rescue him from "the consequences of his voluntary choice[s]" (*United States* v. *Scott*, 437 U.S. at 99). Those events do not, however, bespeak the type of "governmental overreaching that double jeopardy is supposed to prevent." *Ohio* v. *Johnson*, 467 U.S. at 502.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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